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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

298,999, No. 314, 315 & 324

JOHN F. McCARTHY (with whom The Chase National Bank of the City of New York was impleaded below),

Petitioner,

against

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF THEREON

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Furthermore, this Court's decision in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, has in effect approved *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332 27

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

JOHN F. McCARTHY (with whom THE CHASE NATIONAL BANK of the City of New York was impleaded below),

Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as successor to the Alien Property Custodian.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, John F. McCarthy, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that court made in the above cause on June 2, 1950.

This petition is a companion to the petition filed simultaneously herewith entitled "John F. McCarthy (with whom the Federal Reserve Bank of New York was impleaded below), petitioner, vs. J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian."

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[1] J. Howard McGrath was substituted in the Court of Appeals for Tom C. Clark, as Attorney General.

Both cases were brought by the Attorney General to test the validity of a New York State Court attachment issued in a single action instituted by petitioner against Reichsbank, a German bank, and levied upon its accounts maintained with The Chase National Bank of the City of New York and the Federal Reserve Bank of New York. Though there was but one action in the state court, the Attorney General filed two separate proceedings in the District Court, one relating to the accounts with the Chase Bank and the other to the accounts with the Federal Reserve Bank. Each bank was a party only to that proceeding which involved the particular accounts maintained with it. Both in the District Court and the Court of Appeals the two cases were decided by a single opinion, although they were presented by separate records and briefs and resulted in separate judgments. The banks did not appeal from the District Court judgments.

Jurisdiction

The date of the judgment to be reviewed is June 2, 1950. A petition for rehearing was filed on June 16, 1950, and denied on June 27, 1950.

The jurisdiction of this Court to issue the writ of certiorari applied for is predicated upon Title 28 of the United States Code, Section 1254.

The original and requisite copies of the record are on file in this Court. The records in the instant case and in the companion Federal Reserve case have been bound together and designated respectively Parts I and II.[2]

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[2] Record references are as follows: "IR" refers to the record in the instant case; "IIR" refers to the record in the Federal Reserve case. References are to folios, except as otherwise indicated.

Summary Statement of the Matter Involved

Frank W. Mondell, a resident of the District of Columbia, and who was a member of the 54th (1895-1897) and 56th-67th (1899-1923) Congresses, majority floor leader in the 66th and 67th Congresses, and Director of the War Finance Corporation (1923-1925), performed certain legal services for and at the special instance and request of the Reichsbank (IR 167), a German banking corporation not doing business in New York. His claim for compensation for such services was unpaid at the time of his death in August 1939. Letters of Administration with his will annexed were duly granted by the United States District Court for the District of Columbia to William H. Mondell who, after qualifying as administrator, duly assigned the decedent's claim against Reichsbank to your petitioner, a New York resident and citizen of the United States (IR 168).

When Germany invaded Norway and Denmark, the President invoked Sec. 5 (b) of the Trading with the Enemy Act and issued Executive Order No. 8389, freezing property in the United States belonging to Norway and Denmark and their nationals on or since April 8, 1940, in order to assure that title in such property could not be acquired by Germany through the conquest of those countries. In Section 7 of the Order the President delegated to the Secretary of the Treasury the power to administer the freezing controls. By Congressional Joint Resolution enacted May 7, 1940, Sec. 5 (b) was amended to cover stocks and other securities by the insertion of provisions for regulation of dealings in "evidences of indebtedness or evidences of ownership of property", and the Executive Order and regulations and rulings issued thereunder were also approved and confirmed.

The purpose of the Joint Resolution is found in the following exchange which occurred betweeen Senator Con-

nally and Senator Wagner, Chairman of the Committee on Banks and Currency, which had reported out the resolution (86 Cong. Rec. 5007):

> "Mr. Connally: And is not this measure for the purpose of *preventing change of title* of the property here in the United States by conquest, or by any other forceable or violent means?
>
> "Mr. Wagner: That is exactly the purpose." [Italics supplied.]

By the Joint Resolution it was also intended that United States citizens having claims against owners of blocked property would be protected by the freezing controls, as is apparent from the following statement of Senator Barkley (86 Cong. Rec. 5006):

> "It should also be stated—and I am sure the Senator [Wagner] omitted it by oversight—that the joint resolution is intended not only to protect the nationals of Norway and Denmark who have interest in stocks, securities, and other property in the United States, but it is also intended to protect American citizens in the event they have claims of any sort growing out of these transactions, and we preserve the property not only for its owners but for the benefit of Americans who may have claims."

As Axis conquest progressed, Executive Order No. 8389 was extended to other countries, and on June 14, 1941, it was made applicable by Executive Order No. 8785 (6 F. R. 2897) to all other remaining continental countries, including Germany.

The Executive Order, Section 1, forbade the transactions in blocked property therein specified unless

> "*authorized* by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, *or otherwise*, * * *." [Italics supplied.]

Although the words of the Executive Order did not forbid the commencement of suits by United States citizens against blocked nationals, including German nationals, by attachment of their property within the Court's jurisdiction, nevertheless, hundreds of applications were submitted to the Secretary by prospective litigants for authorization to attach blocked assets. Answering these requests, the Secretary ruled that a license was not required because the bringing of an action and the attachment therein of blocked property were not forbidden by the freezing controls but that, if the attaching creditor recovered a judgment against the blocked national, a license would be required before the attached blocked funds could be paid to satisfy the judgment.

The Attorney General has stipulated here (IR 256, 264-267) the following facts:

"5. From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

> Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

"6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freez-

ing' control program adopted the position, in response to numerous requests made of him, *that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property* found within the jurisdiction of the court which issued the warrant *were not forbidden* but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor. *A license to institute the action and levy the attachment was in fact not required by the Treasury Department.*" [Italics supplied.]

On January 21, 1942, your petitioner brought an action against Reichsbank in the New York Supreme Court, Kings County, to recover $24,810. with interest thereon from May 30, 1939, for the legal services rendered Reichsbank by Frank W. Mondell. On the same day a warrant of attachment duly issued out of the New York Court to the Sheriff of the City of New York who levied upon the accounts of Reichsbank with the Chase Bank, among others, by serving on that day a certified copy of the warrant on the Chase Bank (IR 21, 168). Thereafter the summons was served upon Reichsbank by publication in accordance with the terms of an order of the New York Court and, as directed by said order, copies of the summons, complaint, the order for publication and notice to the defendant, were mailed

to the Attorney General of the United States on behalf of Reichsbank, as then required in such case by Rule 50 of the New York Rules of Civil Practice. The Attorney General acknowledged receipt thereof. Neither Reichsbank nor the Attorney General appeared in the action or took any steps therein, and on April 24, 1942, judgment was entered in petitioner's favor against Reichsbank for $29,660.21 (IR 168-174).

Since the accounts levied upon were still "frozen", they were not turned over by the Chase Bank to the Sheriff to be applied in satisfaction of the judgment. From time to time the New York Supreme Court ordered the time extended within which the Sheriff might institute proceedings to reduce the attached accounts to his possession, and the orders of extension were duly served upon the bank (IR 115-117). By reason thereof the accounts continue under attachment (N. Y. Civil Practice Act, Sec. 922). The warrant of attachment is still outstanding and has never been vacated or modified, nor has it been released or discharged, or annulled (IR 117, 187).

Some four and one-half years thereafter, and on October 3, 1946, the Alien Property Custodian executed Vesting Order No. 7792, purporting to vest the debts or other obligations owing Reichsbank by the Chase Bank arising out of dollar checking accounts maintained by Reichsbank with the Chase Bank, including any and all rights to receive, demand, enforce and collect the same (IR 37-44). By letter of November 26, 1946, the Office of Alien Property, Department of Justice, as successor to the Alien Property Custodian, directed the Chase Bank to forward checks for the amounts represented by the accounts to his office (IR 47, 51-53). The Chase Bank refused to comply with this direction until the Sheriff released the warrant of attachment (IR 82).

Fourteen months thereafter, and on January 23, 1948, the Attorney General, as successor to the Alien Property

Custodian, instituted the proceeding in the District Court by petition and order to show cause directed to the Chase Bank, the Sheriff, your petitioner, and one Zittman, another attaching creditor of Reichsbank. The Attorney General sought, as against your petitioner, a decree declaring (1) that by virtue of Executive Order No. 8389, as amended your petitioner and the Sheriff obtained no lien or other interest in the Reichsbank accounts with the Chase Bank, which had been attached by petitioner in his New York action and (2) that by virtue of the Vesting Order the Attorney General is entitled to these accounts (IR 29).

In his brief in the District Court the Attorney General took the position that he was "requesting only a declaration of rights"; that he "does not seek an order * * * directing that the funds be surrendered to him"; and that "the nature of the judgment requested will interfere with possession of the state court under the writs of attachment only to the extent that in later appropriate proceedings the state court will be bound to recognize the rights adjudicated here."

Furthermore, the Attorney General made the following concession in his brief in the District Court:

> "But for the impact of Executive Order No. 8389 as amended, and regulations of the Treasury Department issued pursuant thereto, it is conceded that under the law of New York both the attaching creditors and the Sheriff would have acquired liens on the applicable funds through the attachments and levies."

Although the District Court found (IR 303) "that the Treasury Department advised prospective litigants that no license was necessary to bring suit and secure the issuance of a warrant of attachment", nevertheless, the Court considered itself "bound" by the decision of the Court of

Appeals for the Second Circuit in *Clark* v. *Propper*, 169 F. (2d) 324 (IR 299, 302), and granted the relief sought by the Attorney General.

The Court of Appeals for the Second Circuit affirmed the decree of the District Court "on the authority of *Propper* v. *Clark*, 337 U. S. 472", in which case there was involved a New York State Court order appointing a permanent Receiver and actually directing the transfer of an Austrian corporation's claim to the Receiver, and this Court held that the "freezing order" was merely directed against "shifts in title to blocked assets". In that case the Receiver contended that "a vesting of title" in him was "an essential prerequisite to the exercise of jurisdiction *in rem* over the assets within the State of a non-resident" served by publication, and this Court disposed of this contention by pointing out that the New York Court could have acquired jurisdiction over the assets within New York of a blocked national in a way other than by seizure of title such as, for example, by an attachment.

Statutes and Executive Order Involved

The pertinent statutes are the Trading with the Enemy Act, approved October 6, 1917, as amended, particularly Sections 5 (b) and 7 (b); the Joint Resolution of May 7, 1940, amending Section 5 (b) of the Trading with the Enemy Act and approving Executive Order No. 8389; The New York Civil Practice Act, Sections 520, 645, 916, 917, 922, 948 and 969, and the New York Judiciary Law, Sections 750, 753 and 773.

The Executive Order involved is Executive Order No. 8389, as amended.

The relevant provisions of the statutes and Executive Order are collected in the Appendix annexed to the brief attached hereto.

Questions Presented

The questions presented are:

First. Whether the commencement of petitioner's suit against Reichsbank in the New York Court and the levy of the warrant of attachment issued therein for jurisdictional purposes upon the blocked accounts of Reichsbank with the Chase Bank were forbidden by Executive Order No. 8389, as amended.

Second. Assuming, but without conceding, that by the words of Executive Order No. 8389, as amended, the commencement of suits by attachment of blocked assets was forbidden "unless authorized by the Secretary of the Treasury by means of regulations, rules, instructions, licenses, or otherwise" (the Order, Section 1), whether the attachment for jurisdictional purposes of Reichsbank's blocked accounts with the Chase Bank in aid of the New York action by petitioner, an American citizen, against Reichsbank, a non-resident blocked national, was authorized by the Secretary of the Treasury in view of the Attorney General's concession in this case that "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action" (1R 265).

Third. Whether this case is controlled by *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, decided June 5, 1950, or by *Propper* v. *Clark*, 337 U. S. 472.

Fourth. Whether the District Court was required to give full faith and credit to petitioner's New York attachment, and to decline to entertain this cause.

Specification of Errors

The United States Court of Appeals erred:

First. In deciding that petitioner's attachment was forbidden by Executive Order No. 8389, as amended, and, therefore, invalid.

Second. In refusing to hold that petitioner's attachment was authorized by the Secretary of the Treasury and, therefore, valid.

Third. In deciding that this case is controlled by *Propper* v. *Clark*, 337 U. S. 472.

Fourth. In refusing to hold that the District Court should have given full faith and credit to petitioner's attachment and should have declined to entertain this cause.

Fifth. In affirming the decree of the District Court and refusing to reverse such decree and direct dismissal of the Attorney General's petition.

Reasons Relied On for the Allowance of the Writ

1. The decision of the court below clearly conflicts with the decision of the New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332.

In the *Polish Relief* case, a Delaware non-profit corporation commenced an action by attachment of defendant's accounts with New York banks. Defendant appeared specially to contest jurisdiction upon the ground (288 N. Y. 337) that Executive Order No. 8389 "so far immobilized its deposit accounts * * * as to render them wholly unattachable in the absence of a lifting license of the Secretary of the Treasury." The United States submitted to the New York Court of Appeals a brief *amicus curiae* in which was made the same concession of fact as is set forth

in paragraph 5 of the stipulation of fact in the instant case and the further concession (p. 39 of the Government's brief in that case) that

> "From the terms of the statement, it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action."

In sustaining the validity of the attachment, the New York Court of Appeals held (p. 338):

> "The Executive Order did not forbid attachment of the conceded interest of the defendant in the credits upon which the levies were made. For all we know, payment of the blocked accounts to the credit of this action can be permitted consistently with the purpose of the Order. We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff. (Cf. *Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193, 200.) The lien of an attachment is always hypothetical in some degree. A 'seizure subject to license' was, we think, sufficient for the purpose of jurisdiction *in rem* over the deposits in question. * * *
>
> As *amicus curiae*, the government of the United States informs us of its decision that the levies of this attachment do not offend any national policy implied by the Executive Order. We do not presume to contradict this executive determination."

2. The decision of the court below clearly conflicts with the decision of the District Court in *Sun Insurance Office Limited* v. *Arauca Fund*, 84 F. Supp. 516.

There, the libelant filed on July 11, 1941, a libel *in personam* with clause of general attachment in a cause of general average against a German steamship company, and on July 12, 1941, when the Executive Order was in force

with respect to German property, the SS. "Arauca", belonging to the Germany company, then in Port Everglades, Florida, was attached. As found by the court (p. 518), the libelant "did not apply for or procure a license under the said Executive Order authorizing the attachment of the 'Arauca' ". The U. S. Maritime Commission requisitioned the ship on July 28, 1941, and deposited with the U. S. Treasurer a sum on account of just compensation for the vessel's requisition. On October 28, 1942, the Alien Property Custodian vested all property of or owing to the German company in an action *in rem* by the libelant against the deposited fund. The Attorney General, as successor to the Custodian, appeared as claimant contending that the libelant did not have a valid attachment lien on the vessel because a license under the Executive Order had not been applied for or procured authorizing the attachment. Judge Holland held, as a matter of law (pp. 518-519):

> "On the date of the requisition of the 'Arauca' by the United States Maritime Commission, July 28, 1941, the libelant herein had a valid attachment lien on the vessel by virtue of its attachment of July 12, 1941, notwithstanding the fact that no license authorizing said attachment was secured from the Secretary of the Treasury under the provisions of Executive Order 8389. No license or permit under said Executive Order was required to validate libelant's attachment lien."

3. The decision below conflicts with the decision in *Murray Oil Products Co.* v. *Mitsui & Co., Ltd.*, 55 F. Supp. 353, affirmed 146 Fed. [2d] 381.

In that case the New York office of the defendant, a Japanese corporation, was taken over by the U. S. Treasury Department on December 8, 1941, and placed in liquidation until on or about August 17, 1942, when the Alien Property Custodian vested title to the defendant's prop-

erty in the United States. Meanwhile, and on December 17, 1941, plaintiff commenced an action against the defendant in the New York Supreme Court and procured a warrant of attachment which was levied by the Sheriff on December 23, 1941, on the defendant's bank balances with the National City Bank and the Chase Bank in New York City. The action was thereafter removed to the Southern District. As appears from an affidavit of plaintiff's attorney found at page 26 of the Record on Appeal to the Court of Appeals for the Second Circuit, the Sheriff was informed at the time of the levy "that the attached sums would be held subject to Executive Order 8389" and, therefore, plaintiff's attorney "perceived no necessity of having the attached amount physically turned over to the Sheriff in advance of the judgment in the action" and "made no application for the necessary license and took no steps to compel the turning over of the funds to the Sheriff."

In his affidavit plaintiff's attorney also stated (at p. 28 of the Record on Appeal) that on March 18, 1942, he informed by letter the Treasury Department, Alien Property Custodian, and the Department of Justice, of the attachment action against Mitsui and the steps taken therein and inquired whether there was any objection by them, or any other agency of the government to the prosecution of the action during the pendency of the war; that the Department of Justice made no objection and J. W. Pehle, Assistant to the Secretary of the Treasury, by letter dated April 17, 1942, specifically stated that "the Treasury Department will interpose no objection", and that the Alien Property Custodian's general counsel by letter dated April 28, 1942, referred to the Executive Order and suggested that plaintiff's attorney "apply to the Federal Reserve Bank of New York for information regarding the application of provisions of this Executive Order to the satisfaction of a claim of your client or of a judgment rendered in its favor out of assets belonging to Mitsui & Co., Ltd., which are now frozen."

The District Court for the Southern District granted judgment in plaintiff's favor in that case, long after the Custodian had vested the attached accounts, stating (55 F. Supp. at p. 356):

> "* * * Ordinarily the judgment would be satisfied in whole or in part out of the monies attached, but, it appears, they have passed into the possession of the Alien Property Custodian. It is conceded that it will be necessary for the plaintiff to file a claim with him. The judgment will be evidence of the debt.
>
> "It may be that the Alien Property Custodian has sufficient assets in his possession to satisfy all of the creditors of Mitsui & Co. Ltd., in full. On the other hand the liabilities of the defendant, at least the claims which have been or may be filed with the Alien Property Custodian, may exceed the assets in his possession.
>
> "The plaintiff should be entitled to litigate any right to a preference which it claims by reason of the attachment and levies thereunder. That issue has been created by the operation of the Trading with the Enemy Act, 50 U. S. C. A. Appendix § 1 et seq."

On the defendant's appeal "taken by direction of * * * the Department of Justice and the Alien Property Custodian" (see, Notice of Appeal at p. 67 of the Record on Appeal), the Court of Appeals for the Second Circuit affirmed the judgment with an opinion by Judge Learned Hand.

4. The decision of the court below conflicts with this Court's decision of June 5, 1950, three days after the decision below, in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, affirming judgments of the New York Court of Appeals which sustained the validity of preferential claims under New York law against the Superintendent of Banks, as Liquidator for the Custodian of the New York branch of the Yokohama Specie Bank, Ltd.,

based on voluntary unauthorized transactions in frozen funds. Although the Custodian, who had vested the "excess proceeds of the business and property * * * of The Yokohama Specie Bank, Ltd." (299 N. Y. 125), appeared as *amicus curiae* in those cases before the New York Court of Appeals, as well as before this Court, and advanced the very contentions made by the Attorney General below, the New York Court of Appeals held (299 N. Y. 790, 791) that "the provisions of Executive order No. 8389, as amended, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained, * * *".

The decision of this Court in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran* was called to the attention of the court below by petition for rehearing (IIR p. 108), but the petition was denied without opinion (IIR p. 121).

5. Since this Court in *Propper* v. *Clark*, 337 U. S. 472, (a) held that the freezing order was merely directed against "shifts in title to blocked assets", (b) clearly pointed out that this Court was not deciding "whether every determination of rights concerning blocked property" in unauthorized "litigation is voidable", and (c) indicated that an attachment of blocked assets within New York of a nonresident as a prerequisite to the exercise of jurisdiction *in rem* is not forbidden by the Executive Order because an attachment is not a seizure of title, and since in the instant case the Attorney General concedes that the attachment was not forbidden and was also authorized, the court below erred in deciding that petitioner's attachment is invalid on the authority of *Propper* v. *Clark*.

6. The decision of the court below in effect deprives citizen creditors in the United States of the right to sue by attachment their non-resident debtors who are na-

tionals of blocked countries and deprives American citizens of their right, recognized by Section 7 (b) of the Trading with the Enemy Act, to sue their non-resident alien enemy debtors by attachment.

7. Since a violation of the Executive Order is an offense under Section 5 (b) of the Trading with the Enemy Act, subjecting the offender to a prison term and fine, the decision of the court below stamps the levy of petitioner's attachment as an offense under the Order, notwithstanding that the Order does not plainly and unmistakably forbid suits by attachment of blocked assets and, also, that the attachment was concededly authorized.

8. The precise issue involved in this case has never been squarely passed upon by this Court, and petitioner has been advised that this cause and the companion Federal Reserve case were brought by the Government as test cases, on the ultimate fate of which will depend the validity of numerous attachment actions and judgments recovered therein by American citizens against blocked nationals and non-resident alien enemies. As at August 18, 1950, the New York City Sheriff has paid out over $2,000,000 of attached blocked funds to satisfy judgments, payment of which was licensed by the Treasury after judgment. There are also pending in New York County alone 49 cases in which the Sheriff has attached over $16,000,000 of blocked funds or property not including securities and other property of an undetermined value (See Appendix, p. 44).

The questions here involved are of general importance, and questions of substance relating to the administration of the freezing control program. The record on appeal establishes that petitioner's attachment of Reichsbank's accounts with the Chase Bank did not involve foreign confiscation or duress and was not levied for any hostile or subversive purpose, or for any purpose contrary to the

interest or policy of the United States, but, on the contrary, was the exercise by an American citizen of a remedy for the collection of his claim against a non-resident alien enemy, as the laws of New York gave him. Furthermore, as has been pointed out, the Attorney General has conceded here that the attachment was not forbidden and was also authorized.

Wherefore, your petitioner prays for the allowance of a writ of certiorari to the United States Court of Appeals for the Second Circuit in this cause, there entitled *J. Howard McGrath*, Attorney General, as successor to the Alien Property Custodian, Petitioner-Appellee, v. *Chase National Bank of the City of New York* and *John J. McCloskey, Jr.*, as Sheriff of the City of New York, and *Leo Zittman* and *John F. McCarthy*, Respondents-Appellants, that said cause may be reviewed and determined by this Court, and that the judgment of the said United States Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

JOHN F. MCCARTHY,
Petitioner.

By HENRY I. FILLMAN,
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September 12, 1950.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 82 F. Supp. 740, and may be found on page 97 of the record in the instant case (IR p. 97). The *per curiam* opinion of the Court of Appeals for the Second Circuit is reported at 182 F. 2d 349, and may be found at page 99 of the record in the Federal Reserve case (IIR p. 99).

ARGUMENT

I

Since, as a matter of law, petitioner had the right to commence his action against Reichsbank by levy of the attachment on its accounts with the Chase Bank, and since Executive Order 8389, as amended, as the Attorney General by the stipulation has here conceded, did not forbid suits by attachment of blocked assets, petitioner's attachment levied on January 21, 1942, on the accounts of Reichsbank with Chase was not forbidden by the Order and, therefore, was valid.

As a matter of law, petitioner could sue Reichsbank in the New York courts on January 21, 1942, when the United States was at war with Germany, though Reichsbank could not sue in our courts.

McVeigh v. *United States*, 11 Wall. 259;
University v. *Finch*, 18 Wall. 106, 111;
Porter v. *Freudenberg* [1915], 1 K. B. 856, 882.

The Congress recognized the common law right to bring suit in the courts of the United States against alien enemies by expressly providing in Section 7 (b) of the Trading with the Enemy Act [40 Stat. at p. 417], as follows:

> "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof [which relates to patent, trademark and copyright suits] * * . And provided further, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

Since Reichsbank, an alien enemy, is a German corporation and a nonresident of New York, personal service on it in the State of New York in order to give the New York court jurisdiction of petitioner's action could not have been made. Petitioner's action could only have been brought upon substituted service of process by publication. But such substituted service is only effectual where a warrant of attachment has previously issued and a levy made on property of the defendant in the State.

> *Pennoyer* v. *Neff*, 95 U. S. 714;
> *Helme* v. *Buckelew*, 229 N. Y. 373;
> *Dimmerling* v. *Andrews*, 236 N. Y. 43;
> *McCarthy* v. *Culkin*, 254 N. Y. 328;
> *Schram* v. *Keane*, 279 N. Y. 227, 233-234.

Manifestly, unless Reichbank's accounts with the Chase were attached and proof thereof made when petitioner applied to the New York Supreme Court for an order of substituted service by publication, jurisdiction of Reichsbank or of its property could not have been acquired by the New York court, with the result that petitioner could

not have maintained his action. Control by the New York court of the *res* in the State was the foundation of jurisdiction of petitioner's action, and that jurisdiction, if obtained at all, could only have been obtained by the levy of a warrant of attachment upon Reichbank's accounts with the Chase.

Riverside & Dan River Cotton Mills v. *Menafee*, 237 U. S. 189;
Helme v. *Buckelew, supra.*

Since petitioner, as a matter of law, had the right to sue Reichsbank, and since it was essential that petitioner obtain and levy a warrant of attachment on property of Reichsbank in New York in order to give the New York Court jurisdiction, it follows that petitioner had the right to institute his action on January 21, 1942, by the levy of the attachment warrant upon Reichsbank's accounts with the Chase.

Watts, Watts & Co., Ltd. v. *Unione Austriaca di Navigazione*, 248 U. S. 9, 21-22;
Hepburn's Case, 3 Bland (Md.) 95, 120, 121;
Dorsey v. *Kyle*, 30 Md. 512, 520;
Mixer v. *Sibley* 53 Ill. 63, 70.

It is plain that the words of Executive Order No. 8389, made applicable to Germany in peacetime on June 14, 1941, do not forbid the commencement of suits in United States courts against nonresident German nationals by attachment of their property within the Courts' jurisdiction. It cannot be said from the language used in the Order that the President made his position in this respect self-evident. The failure to express clearly an intention to forbid suits by attachment of blocked assets is emphasized by the language used in other proclamations or executive orders to prohibit attachments. For example, in the

proclamation of December 26, 1917, taking over the control of the railroads the President stated that "Except with the prior written assent of said director, no attachment by mesne process * * * shall be levied on" the property of the railroads used in their business as common carriers (see *Dooley* v. *Pennsylvania R. Co.*, 250 Fed. 142, 143).

More recently, President Truman's executive order of August 25, 1950, providing for taking over the country's railroads and for their operation by the Secretary of the Army in the name of the United States Government provides in part as follows:

> "8. Except with the prior written consent of the Secretary, * * * no attachment by mesne process, garnishment, execution or otherwise shall be levied on or against any of the real or personal property or other assets of any such carrier; * * *."

The very definiteness with which an attachment was forbidden in these Presidential Orders and the absence of such a prohibition in Executive Order No. 8389, leads a reasonable person to believe that the President did not intend by the freezing order to prohibit suits by attachment of frozen assets.

That the freezing order did not forbid the commencement of suits against blocked nationals by levy of a warrant of attachment was decided by the New York Court of Appeals in *Commission for Polish Relief Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 322, and by the Federal Court in *Sun Insurance Office, Limited* v. *Arauca Fund*, 84 F. Supp. 516.

There is no conflict between petitioner's New York attachment action and the freezing order. This is clear from the opinion of the City Court of New York, New York County in *Metallo-Chemical Corp.* v. *Banque Trans-*

atlantique S. A., 67 N. Y. Supp. (2d) 187.[3] The Court there said, at pages 188-189:

> "These requirements were in no way suspended by the Executive Order, nor as Commission for Polish Relief v. Banca Nationala a Rumaniei, 288 N. Y. 332, 43 N. E. 2d 345, makes plain, is there any necessary conflict between the Order and the New York statutes. Proceeding under both all steps under an attachment may be taken except one; the only restraint upon the bank was that it could not pay over to the Sheriff a debt which was in a 'blocked account.'
>
> "The plaintiff was not required to sue when the bank failed to pay over. But it was required to keep the attachment alive for jurisdictional purposes, Civil Practice Act, § 922, either by suing or by having its time to do so extended until the freezing restrictions had been removed, or a license to pay over granted. If the plaintiff, with the Order still in effect had sued the bank, the latter might have justified its refusal to pay by referring to the lack of power to do so; if judgment had gone against it, it might again rely on the Order to stay its enforcement, where as here, it admits its indebtedness to the defendant. Or it might even have been required to pay over the blocked account to the Sheriff 'to the credit of this action' to await the event and the further order of the court, 288 N. Y. 332, 338, 43 N. E. 2d 345, 347; Civil Practice Act, § 940. But whatever the outcome of an action against the Bank in aid of the attachment, the matter would remain in *status quo* within the limitations imposed by the Order. *The plaintiff would be free to proceed to judgment in the principal case, but there would*

---

[3] The Attorney General conceded in the stipulation (IR 267) that the Treasury subsequently issued a license, attached to the stipulation as Exhibit B (IR 280), authorizing the payment of the judgment recovered by the plaintiff in that action.

be no payment until the Government released its hand. Our Courts will determine whether the plaintiff should succeed and whether it has proceeded in a manner that would entitle it to the benefits of an attaching creditor; the Government will not interfere with that judgment but will not permit the plaintiff to collect the amount awarded until it first decides that the receipt of the money by the plaintiff will not offend the objectives of the Order and of the Trading with the Enemy Act. Thus the two provisions, state and federal conjoin to declare the plaintiff's right, and there is no conflict between them." (Italics supplied.)

Apart from the foregoing, the Attorney General has conceded that the freezing order does not forbid the commencement of suits by attachment of blocked assets for he stipulated (IR 265-266) that the Secretary of the Treasury adopted the position, in response to numerous requests, that the bringing of an attachment action and the levy of an attachment upon blocked property "were not forbidden" and that a license "to institute the action and levy the attachment was in fact not required by the Treasury Department." Furthermore, in his brief below, at page 24, he said:

> "Appellants stress throughout their briefs that a license was not required to institute a suit by attachment. Appellee concedes this and has so stipulated (266)."

II

Assuming, but without conceding, that the Executive Order lawfully forbade the commencement of suits by attachment of blocked assets unless authorized by the Secretary of the Treasury, nevertheless, the Secretary authorized commencement of suits by levy of attachments upon such assets.

The Executive Order provides in Section 1 that the transactions therein specified are forbidden unless

> "*authorized* by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, *or otherwise*, * * *." (Italics supplied.)

The word "authorized" means, when considered with the context, "permitted", and its use in this context reserved to the Secretary of the Treasury the right to permit a transaction covered by the order by means of regulations, or rulings, or instructions, or licenses, or otherwise." In other words, the Secretary was given the right to permit a transaction in any manner he saw fit.

It is apparent from the quoted language of the Order that great confusion is introduced if one speaks of a "license" under the Order, which is not what the order speaks of, and does not reserve the word "license" for one of the many methods by which the Secretary can *authorize* a transaction covered by the Order.

The Attorney General has conceded by the stipulation (IR 263) that from the inception of "freezing" controls all litigants who proposed to sue by attachment of blocked assets, and had requested the Secretary to authorize an attachment or levy by a license, were advised as follows:

> "Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the

> United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national."

This amounted to an authority to all plaintiff litigants, including petitioner, to bring suit by attachment of blocked assets. In other words, it is an authorization given to the proviso to Executive Order 8389.

It was so recognized by the government of the United States in its brief *amicus curiae* submitted to the New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, for at page 39 of the brief the government set forth the advice to prospective litigants quoted above and then went on to state:

> "From the terms of the statement, it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action."

The legal result of this authorization of the Secretary is that not only were all litigants, including petitioner, permitted to bring suit by attachment of blocked assets, but that the attachment itself is to be regarded as valid.

III

Propper v. _Clark_, 337 U. S. 472, cannot be regarded as authority for the proposition that Executive Order No. 8389, as amended, forbade the commencement of actions against blocked nationals by attachment of their assets, particularly since the Attorney General has conceded that such attachments were authorized, but, on the contrary, this Court's decision in that case indicates that the Executive Order does not forbid such attachments.

Furthermore, this Court's decision in _Lyon_ v. _Singer_ and _Lyon_ v. _Banque Mellie Iran_, 339 U. S. 841, has in effect approved _Commission for Polish Relief, Ltd._ v. _Banca Nationala a Rumaniei_, 288 N. Y. 332.

The transaction involved in the *Propper* case was an unauthorized transfer by judicial order of title to blocked property from an Austrian corporation to a receiver appointed under Section 977 (b) of the New York Civil Practice Act. This Court held that the freezing order merely directed against "shifts in title to blocked assets", and clearly pointed out that it was not deciding "whether every determination of rights concerning blocked property" in unauthorized "litigation is voidable." This is manifest from the following, at page 486 of the report:

> "It is our conclusion that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, put into effect a valid plan for control of the property covered by the regulation that prohibited any change of title to that property by reason of the subsequent appointment of petitioner as permanent receiver. We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to

blocked assets and the prohibition of the Executive Order against transfers of such a credit as this."

But, the levy of a provisional attachment under New York law does not shift the title to the attached property, which is merely held in the custody of the law as security for any judgment which the attaching creditor may recover.

Klinck v. *Kelly*, 63 Barb. (N. Y.) 622, 629;
Columbia Bank v. *Ingersoll*, 21 Abb. N. Cas. (N. Y.) 241;
Fielmann v. *Brunner*, 2 Hun (N. Y.) 354, 356, 357;
Embree v. *Hanna*, 5 Johns. (N. Y.) 101, 103;
West Virginia Pulp & Paper Co. v. *People's Home Journal, Inc.*, 233 App. Div. (N. Y.) 376, 377;
Sanders v. *Armour Fertilizer Works*, 292 U. S. 190, 208 (dissenting opinion of Mr. Justice Cardozo citing *Embree* v. *Hanna, supra*, as the authority in New York);
Elkay Reflector Corporation v. *Savory, Inc.*, 57 F. (2d) 161;
Steingut v. *National City Bank of New York*, 38 F. Supp. 451, 452.

Moreover, in the *Propper* case the government did not concede that the appointment of the permanent receiver under Section 977 (b) of the New York Civil Practice Act was not forbidden by the Order and it did not appear that the Treasury had authorized such an appointment, whereas, in the case at bar the Attorney General has not only conceded that the Order does not forbid the commencement of suits by attachment of blocked assets, but, also, that the Treasury authorized such suits.

In addition, this Court's opinion in the *Propper* case indicates clearly that the bringing of an action by attachment of blocked assets was not forbidden, because an attachment does not seize title to the attached property.

Propper contended that "a vesting of title" in the receiver was "an essential prerequisite to the exercise of jurisdiction *in rem* over the assets within the State of a non-resident" served by publication. This Court pointed out that the New York Court could have acquired jurisdiction over the blocked assets in a way other than by seizure of title such as, for example, by an attachment. This is apparent from the following (p. 488):

> "Petitioner contends here for the first time that a vesting of title in the temporary receiver is an essential prerequisite to the exercise of jurisdiction *in rem* over the assets within the State of a nonresident association which is served by publication. The contention is that an affirmance of the court below on the issue of state law will render proceedings under § 977-b subject to an attack on constitutional grounds under the doctrine of *Pennoyer* v. *Neff*, 95 U. S. 714. In our opinion the argument is without merit. *Pennoyer* v. *Neff* merely holds that a personal judgment cannot be obtained against a nonresident on service by publication. It recognizes at page 733 that for an *in rem* action it is sufficient that the property be within the state, subject to the control of the court, and that there be some form of service which is reasonably calculated to give notice to parties whose interests may be affected by the judgment. Cf. *Milliken* v. *Meyer*, 311 U. S. 457, 463. The first requirement can be met *in other ways than seizure of title*, e. g., by an injuction against transfer of the property, *Pennington* v. *Fourth National Bank*, 243 U. S. 269; *by an attachment*, *Herbert* v. *Bicknell*, 233 U. S. 70; * * *." (Italics supplied.)

Furthermore, in sustaining the New York Court of Appeals judgments in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, for the reason that federal control over alien property remained undiminished because the New York court conditioned enforcement of the preferential claims of

Singer and Banque Mellie Iran upon licensing by the Alien Property Custodian, this Court has in effect approved the holding of the New York Court of Appeals in the earlier case of *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, in which the theory or rationale underlying the decision is the same as in the *Singer* and *Mellie Iran* decision, namely, the freezing controls did not prevent the accrual or creation of claims or rights, including attachment liens, or render them void, but merely prevented payment from the blocked assets in satisfaction thereof without federal authorization.

This Court also indicated in *Singer* and *Mellie Iran* that the *Propper* case is inapplicable in the case at bar involving, as in *Singer* and *Mellie Iran*, a "right, title and interest" vesting order (IR 312; 299 N. Y. 113, 139), because Propper, as receiver, "claimed title" to the blocked assets "adversely to the Custodian, and sought to deny the Custodian's power to vest the property", and no such result would follow from the judgments in *Singer* and *Mellie Iran*. So, too, the *Propper* case is not controlling here for the reason that petitioner does not claim title to the frozen Reichsbank accounts with Chase adversely to the Custodian and does not deny his paramount power to vest, but claims a lien thereon by his attachment, concededly authorized, and for the further reason that federal control over the property remains undiminished because the enforcement of petitioner's claim by payment of the judgment recovered in his attachment action against Reichsbank is under the *Polish Relief* case, conditioned upon licensing by the Alien Property Custodian.

IV

The District Court was required to give full faith and credit to the New York attachment and should have declined to entertain this cause.

The levy of petitioner's attachment on Reichsbank's accounts with the Chase Bank brought the accounts under the jurisdiction of the New York Court.

> *Cooper* v. *Reynolds*, 77 U. S. 308, 317;
> *Matter of United States of Mexico* v. *Schmuck*, 294 N. Y. 265, 268.

Also, the effect of the service of the attachment writ upon the Chase Bank was to forbid the Bank from paying over the attached accounts to anyone other than the Sheriff except by the Sheriff's direction or pursuant to an order of the New York Court. A payment in disregard of this prohibition is a violation of a lawful mandate of the New York Court, constituting a contempt of court punishable by imprisonment and a fine equal to the amount of the judgment with interest.

> *New York Civil Practice Act*, Sec. 917;
> *New York Judiciary Law*, Secs. 750, 753, 773;
> *Peo. ex rel. Cauffman* v. *Van Buren*, 136 N. Y. 252;
> *Clark* v. *Bininger*, 75 N. Y. 344;
> *Lowenthal* v. *Hodge*, 120 App. Div. (N. Y.) 304.

The injunction against payment by the Chase Bank to anyone other than the Sheriff who levied the attachment which is still outstanding, cannot, as a matter of law, be disobeyed.

> *U. S.* v. *United Mine Workers*, 330 U. S. 258;
> *Howat* v. *Kansas*, 258 U. S. 181;
> *Noble* v. *Union River Logging R. R.*, 137 U. S. 165;

Peo. ex rel. Davis & Palmer v. *Sturtevant*, 9 N. Y. 263;
Peo. ex rel. Cauffman v. *Van Buren, supra.*

Full faith and credit was required to be given by the District Court to petitioner's New York attachment.

Huron Holding Corporation v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 193;
Sanders v. *Armour Fertilizer Works*, 292 U. S. 190;
American Surety Co. v. *Baldwin*, 287 U. S. 156, 166;
Steingut v. *National City Bank of New York*, 38 F. Supp. 451.

Furthermore, the Attorney General's action did not seek to enforce a personal liability, but merely sought a declaration that he is entitled to the Reichsbank's accounts, which declaration the New York Court in petitioner's attachment action will be bound to recognize in a proceeding to be instituted by the Attorney General in the New York Court. The declaratory judgment of the District Court nullifies the lien of petitioner's attachment and, if the New York Court is bound to recognize it, in effect disturbs the New York Court's control of the attached property. Thus, the Attorney General's action is a colorable attempt to oust the New York Court of its jurisdiction over the attached property.

In view of the foregoing the District Court should have declined to entertain this cause, particularly since the Attorney General, in seeking to obtain ultimate possession of the attached accounts free of the attachment lien, was given the right by Section 948 of the New York Civil Practice Act to invoke for that purpose the jurisdiction of the New York Court in the first instance and in such a proceeding the New York Court would have been bound to recognize the federal law.

CONCLUSION

Therefore, the questions herein are questions of general importance, and questions of substance relating to the administration of the United States freezing controls, and the Petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

1. Trading with the Enemy Act, Section 7(b), 40 Stat. 417.

"Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof [which relates to patent, trademark and copyright suits] * * *. And provided further, that an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

2. Joint Resolution of May 7, 1940, 54 Stat. 179.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined

by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * * * *

3. Excerpts from Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941 6 F. R. 2897 and Executive Order No. 8998, December 26, 1941 6 F. R. 6785.

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all trans-

fers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any, evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * * * *

SECTION 8. Section 5 (b) of the Act of October 6, 1917, as amended, provides in part:

"* * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person may be imprisoned for not more than ten years, or both; and any officer, director, or agent, of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both."

4. New York Judiciary Law.

§ 750. Power of courts to punish for criminal contempts.

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

* * * * * * *

3. Wilful disobedience to its lawful mandate.

---

§ 753. Power of courts to punish for civil contempts.

A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

* * * * * *

3. A party to the action or special proceeding, an attorney, counselor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

* * * * * *

8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

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§ 773. If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

5. New York Civil Practice Act

§ 520. Judgment against non-resident enforceable only against attached property.

Where a defendant who has not appeared is a non-resident of the state, or a foreign corporation, and the summons was served without the state, or by publication pursuant to an order obtained for that purpose, the judgment can be enforced only against the property which has been levied upon by virtue of a warrant of attachment at the time when the judgment is entered. But this section does not declare the effect of such a judgment with respect to the application of any statute of limitation.

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§ 645. Requisites of execution where warrant of attachment levied.

Where a warrant of attachment issued in the action has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the state, or otherwise than personally, pursuant to an order obtained for that purpose, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

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§ 916. The attachment may also be levied upon:

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3. A debt, arising under or on account of a contract, not represented by a bond, promissory note or other instrument for the payment thereof, negotiable or otherwise, whether or not the said debt is past due, or yet to become due, to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon a special demand, that such demand therefor could be duly made by defendant within the state. The levy of the attachment thereon is deemed a levy upon, and a seizure of all the rights of the defendant in or to the said debt.

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§ 917. A levy under a warrant of attachment must be made as follows:

2. Upon other property subject to attachment, as follows: Where the property consists of a demand, other than as hereinafter specified, by leaving a certified copy of the warrant with the person against whom it exists; * * *

A levy made by service of a certified copy of a warrant of attachment shall apply to any and all property of the defendant or debt owing to him, or to any interest of the defendant therein or thereto, subject to attachment, held or owed by the person on whom it is served, except that the levy shall not apply to such property, debt or interest, if the said person has no knowledge or reason to believe that the said property or debt belongs, or is owing, to the defendant, or is claimed by him or on his behalf, or that he has, or claims to have, an interest therein, unless such property, debt, or interest therein shall be specified in a writing accompanying the certified copy of the warrant.

Any such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court. Any such payment, sale, assignment or transfer shall nevertheless be valid as to the payee or transferee in good faith thereof, and without notice that the warrant has been served.

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§ 922. Actions and special proceedings by sheriff.

1. In the event that the person owing any debt to the defendant, or holding property, effects or things in action

of the defendant or interest therein subject to attachment, on which a levy under a warrant has been made, as in this act provided, shall fail or refuse to deliver such personal property attached, or to pay or assign to the sheriff the said debt, effect or thing in action, or interest therein, the sheriff may, and if indemnified by the plaintiff as hereinafter provided, must, within ninety days after the service of the certified copy of the warrant on such person, commence an action or special proceeding to reduce to his actual custody all such personal property capable of manual delivery, and to collect, receive and enforce all debts, effects and things in action attached by him, and may maintain any such action or special proceeding in his name or in the name of the defendant for that purpose. He may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs. * * *

The service of process commencing such action or special proceeding against any person upon whom a certified copy of a warrant of attachment shall have been served, shall continue as against that person during the pendency of said action or special proceeding all duties and liabilities imposed upon him in the first instance by the service of the said warrant of attachment upon him.

The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. Such an order may be granted upon ex parte application of plaintiff. An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a

certified copy of the said order is served upon said person prior to the expiration of the said ninety days or prior to the expiration of the time for commencing such an action or special proceeding as further extended.

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§ 948. The defendant, or the person upon whom a warrant of attachment has been served, or a person who has acquired a lien upon or interest in his property after it was attached, may apply at any time before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action, to vacate or modify the warrant, or to increase the security given by the plaintiff, or one or more of those forms of relief together or in the alternative.

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§ 969. Satisfaction of judgment from attached property.

Where an execution against property is issued upon a judgment for the plaintiff in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property, or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

* * * * * *

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

6. Correspondence between Counsel for petitioner Zittman and the Sheriff of the City of New York

July 25, 1950

Sheriff of the City of New York,
Hall of Records,
New York, N. Y.

Attention: Mr. Posner

Dear Sir:

I am preparing a petition to the Supreme Court of the United States for a writ of certiorari. The case involves the attachment of blocked funds. I desire to place before the Supreme Court the following facts:

(1) The total number of closed cases in New York County in which the Sheriff levied upon blocked funds and the total sum of money paid out of blocked funds in such cases pursuant to post-judgment Treasury Department licenses.

(2) The total number of cases still pending in New York County in which the Sheriff has levied on blocked funds and the total amount still under attachment.

I shall appreciate it greatly if you will supply me with the mentioned facts.

Very truly yours,

JOSEPH M. COHEN

JMC:ah

Appendix.

CITY OF NEW YORK

OFFICE OF THE SHERIFF

Hall of Records
31 Chambers Street
New York 7, N. Y.

SIDNEY POSNER
Counsel

WOrth 2-4300

August 18, 1950

Joseph M. Cohen, Esq.
36 West 44th Street
New York, 18, N. Y.

Re: McGrath v. Chase National Bank et al.;
McGrath v. Federal Reserve Bank et al.

Dear Mr. Cohen:

In response to your letter of July 25, 1950 in which you requested certain information concerning the attachment of blocked funds, we caused an examination to be made of the records in the New York County division of the Sheriff's Office.

This examination disclosed the following facts:

(1) The Sheriff had attachment levies upon blocked funds in at least 63 cases which were subsequently closed by payments made pursuant to executions upon judgments or court orders. These payments amounting to $2,004,075.71, were authorized by Treasury Department licenses.

(2) There is now pending in New York County at least 49 cases in which, pursuant to warrants of attachment, the Sheriff has levied upon blocked funds or property in a reported amount of $16,548,382.26 which does not include certain securities and other property of an undetermined value.

Very truly yours,

SIDNEY POSNER
Counsel

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